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IN THE

Supreme Court of the United States

October Term, 1937

No. 566

GUARANTY TRUST COMPANY OF NEW YORK,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

JOHN W. DAVIS,
RALPH M. CARSON,
Counsel for Petitioner.

THE BALLOU PRESS NEW YORK

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To correct certain apparent misstatements in the opposing brief of the United States, the petitioner craves leave to submit the following brief statement in reply.

1. *Findings below.* At page 5 the brief of the United States erroneously says that the District Court did not purport to make a final determination of the facts of an unequivocal repudiation of the debt, and says that there were no formal findings of fact or trial of the issue. This is a complete misapprehension of the practice in New York pursuant to which (as shown in our prior brief, pp. 12-13) the complaint may be dismissed upon affidavits showing that there is no issue of fact with respect to certain affirmative

defenses, including the statute of limitations. Under that practice no formal findings as after a trial are required, because the Court finds that there is no issue of fact. Judge Caffey so found here. See at R., 421-32, where he discusses the facts. At R., 421 he says:

> "Is there a triable issue of fact? Or are the facts, insofar as they are material or it is essential for them to be determined, without serious or substantial dispute?"

At R., 431-2 he sets forth eight conclusions of fact as flowing from the evidence "without dispute."

This is as full, final and formal a determination upon the facts as could possibly be had after the most extended trial. It was not reversed, modified or disturbed by the Circuit Court of Appeals.

2. *Contentions of the United States rejected.* In the District Court and in the Circuit Court of Appeals the United States made exactly the same argument made on pages 7-8 of its brief in opposition to certiorari to the effect that the petitioner's unequivocal refusal to pay the debt had not been conclusively determined. The District Court rejected this contention. The Circuit Court of Appeals ignored it, although it constituted Point I, pages 15-24 of the brief of the United States in the Circuit Court of Appeals.

In ignoring the contention of the United States, the Circuit Court of Appeals necessarily rejected it, because otherwise that Court would not have reached the question which it decided, namely the running of the statute of limitations against a foreign sovereign. So with the other point which the brief of the United States (p. 9) says the Circuit Court of Appeals did not consider, viz. the acts of Bakhmeteff and Ughet as binding the State of Russia. That point had previously been determined in favor of the petitioner's position (as pointed out in our petition, p. 6), and the Circuit Court of Appeals necessarily decided it also adversely to the

United States in order to reach the question passed on in this case as to the application of the statute of limitations to a foreign sovereign.

3. *Misstatement as to the record.* At page 8 of the brief of the United States the writer goes so far as to say that the present record is inadequate and deficient as a final and complete presentation of all of the facts of repudiation of the debt because it consists "entirely of affidavits based on information largely in the petitioner's control", without any opportunity to the respondent to cross-examine. This prejudicial statement is untrue. Reference to the record will show that the two principal items of proof as to the accrual of the cause of action were the *depositions* of Ughet (R. 17-68) and Bakhmeteff (R. 69-107). The United States cross-examined as to both (R. 59-60, 67, 92-7, 98-100, 104-7). As to a third important witness the United States filed an affidavit of questions and answers constituting a cross-examination on the basis of his prior affidavit (R. 246-63).

Nor is it true that the information as to the accrual of the cause of action was "largely in the petitioner's control". The chief officer of the petitioner who had direct knowledge as to its repudiation of liability was the former President of the petitioner, Charles H. Sabin, who died before the institution of the action (R. 130). The evidence on the subject was produced from independent witnesses, chiefly by deposition. Some of the evidence showing a repudiation of liability by the petitioner was produced by the United States itself (e. g. R. 229, 239, 326). At least 150 pages of the record (R. 211-362) are occupied by the proof put in by the United States, including files produced from the Treasury Department and the State Department.

4. *Finality of the question of limitations.* The brief of the United States erroneously says (p. 7) that the question of limitations does not dispose of this case and that the petitioner admits there are other issues herein. The defense of limitations is of course decisive of the case if decided in

accordance with the conclusions of the District Court, which entered a final judgment in favor of the petitioner. If the defense is well taken the case is at an end. The brief of the United States does not attempt to answer the considerations stated at page 9 of our petition showing the propriety of a determination here of the defense of limitations before a protracted trial on the only other issue in the case.

5. *Conflict of decisions.* Since the filing of the petition there has been published the decision of the Circuit Court of Appeals for the Ninth Circuit in *U. S.* v. *Moscow-Idaho Seed Co.*, 92 F. (2d) 170, holding that the United States as plaintiff is subject to the affirmative defense of contributory negligence. At page 173 the Circuit Court of Appeals for the Ninth Circuit said, on the authority of language used by this Court in *Luckenbach Steamship Co.* v. *Norwegian Barque Thekla*, 266 U. S. 328, 339, 340:

> "When the United States comes into court and institutes a suit for redress, not based on any infringement of its sovereignty and not for any violation of its governmental prerogatives, and submits a claim wholly in the nature of a private litigant, it, by implication, waives any immunity as sovereign and its adversary is entitled to set up any defense which would be available to him were his opponent another citizen instead of the government."

CONCLUSION.

This case involves matters of novel impression and first importance which should be reviewed by this Court, and a writ of certiorari should issue for that purpose as prayed in the petition.

Respectfully submitted,

JOHN W. DAVIS,
RALPH M. CARSON,
Counsel for Petitioner.

Dated, New York, N. Y., December 8, 1937.